

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)

2014/HP/D157

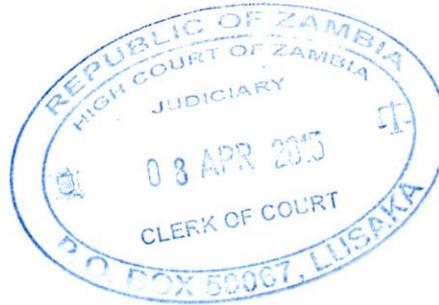
BETWEEN:

KIM ALEXANDRA NOBLE

PETITIONER

ANDREWS JACOBUS KRIEL

RESPONDANT



Before the Honourable Mr. Justice C.F.R. Mchenga SC

For the Applicant: D. Findlay, D Findlay and Associates

For the Respondent: P. Ngoma-Mdwara, Chibesakunda and Company

R U L I N G

The applicant (petitioner), pursuant to Section 72 (6) and (7) of the Matrimonial Causes Act, Act No 20 of 2007, seeks an order to vary the consent order for custody of the parties children dated 2nd December 2014.

At the hearing of the application, the respondent raised a preliminary objection premised on the ground that since the order the applicant seeks to vary is a consent order, it can only be varied with the

consent of both parties. Short of that, as is the case in this matter, the applicant must commence a fresh action for the purpose. In support of that proposition counsel referred to **Order 42 Rule 5A/4 of the Rules of The Supreme Court, 1999 Edition** and the cases of **Zambia Seed Company Limited and Chartered International (PVT) Limited SCZ judgment No.20 of 1999, Sentor Motors Limited and 3 Other Companies (1996)SJ (SC)** and **Lusaka West Development Company Limited, B.S.K. Chiti (Receiver) Zambia State Insurance v Turnkey Properties Limited (1990 SJ)**.

On behalf of the applicant, counsel submitted that the applicable provision to the situation at hand, is **Order 45(5)(A) Sub Rule 3** and not **Order 42 Rule 5 A4** but in any case, it is not applicable to applications to vary custody orders. She also referred to **Section 72(1)(a) of the Matrimonial Causes Act** and submitted that the court has the power to make any order it deems fit, until such time that the children reach the age of 25 years. Finally, she referred to the cases of **Chipfield v Chipfield [1952] 1 AII ER 1360** and **Hull v Hull [1961] 1 AII ER 378** and submitted that in cases where the application is to vary a custody order, the prime consideration is welfare of the child.

I am indebted to both counsels for their submissions and I have taken them into account in arriving at my decision.

Section 72(1) of the Matrimonial Causes Act provides as follows:

"The Court may make such order as it thinks fit for the custody and edition of any child of the family who is under the age of twenty five"

Sub section 7 of the same provision reads as follows;

"The Court shall have power to vary or discharge an order made under this section or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended".

Further, Clause 4 of the consent order, which is the subject of this application, reads as follows:

"VARIATION OF CONSENT ORDER

4.1 *The provision of this consent Order relating to the maintenance of the children of the family, financial provision and property settlement between the parties can be varied by the mutual written agreement of the Petitioner and the Respondent provided that the variations are reduced into writing and signed by each party*

4.2 *In default of agreement the parties shall be at liberty to apply to court for review of the provisions relating to the children of the family only"*

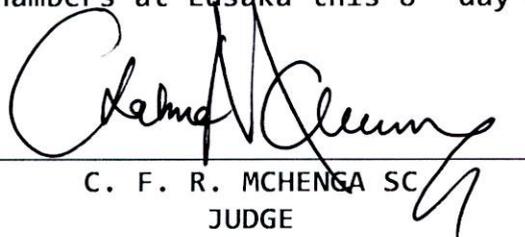
In addition, Clause 5 of the same order, which is titled "MISCELLANEOUS PROVISIONS", provides as follows:

“5.1 *The parties shall be at liberty to apply to vary the terms hereof in the event of breach of the terms of the consent order or if the welfare of the children is in jeopardy*”

From the forgoing, it is clear that under the **Matrimonial Causes Act** this court has the power to vary a custody order. Further, the consent order which is the subject of these proceedings provides that in given circumstances a party can apply for variation of its terms. Whether the parameters set by the order for such variation without the respondent’s consent have been met by the applicant, is a matter that can only be determined after hearing the applications on its merits.

Consequently, the preliminary objection is dismissed with costs.

Delivered in chambers at Lusaka this 8th day of April 2015


C. F. R. MCHENCA SC
JUDGE